SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 600

HERMAN LEE ROSS,

Petitioner

vs.

STATE OF TEXAS

Respondent

BRIEF FOR PETITIONER

Statement of the Case

The Petitioner, Herman Lee Ross, a Negro, was charged by Indictment in the District Court of Galveston County, Texas, with the offense of murder, but prior to his trial a sanity hearing was had and the Defendant was found to be sane; thereafter the Defendant prior to a trial upon the merits, seasonably filed a Motion to quash the Indictment on the ground that the Defendant had been denied due process of law and equal protection of the law as guaranteed to him by the Fourteenth Amendment to the Constitution of the United States, and that for a period of thirty years prior to the Indictment in the *Ross* case, no Negro or person of African descent had been appointed

Grand Jury Commissioner in Galveston County, Texas, and only twice in thirty years prior to such Indictment had a Negro served as a member of the Grand Jury in Galveston County, Texas, and the last time was about ten years prior to the time of Indictment in this case; that the Federal Census for 1940, showed that the population of Galveston County, was 81173 and that of this number 17712 were members of the Negro Race or more than 21% of the total population, the Grand Jury that indicted the Defendant in this cause, consisted of twelve white men. For the purpose of keeping the record straight it will be observed from the Opinion of the Court of Criminal Appeals of Texas 233 S.W. (2d) 126, and also from the Brief of the State of Texas, that reference was made that Guido Nesti was killed by the Defendant in the preparation or perpetration of a robbery.

But there isn't a scintilla of evidence in the record to support such statement. There is also reference to the testimony of Dr. E. A. Etter in both the Opinion of the Court of Criminal Appeals and the Brief of the State of Texas, to the effect: "That Dr. Etter testified that he had known Appellant all of his life; that he had long been a sufferer from tuberculosis and syphilis; that he has been an outcast; a waif of society, he said that Appellant had a tendency to kill, and that he had never mixed with society or made any contribution to it.

The above testimony was introduced upon the sanity hearing in a separate and distinct case, was not incorporated in the Statement of Facts in the Trial Court; should not have referred to in the Opinion of the Court of Criminal Appeals, it should not be incorporated in the State's Brief and should not be in this Brief, but it is so incorporated merely for the purpose of trying to keep the record straight.

This Honorable Court will also find in the Opinion of the Court of Criminal Appeals of Texas, and in the State's Brief in this case, a statement to the effect: "That insofar as the selection, drawing and summoning of Petit Jurors are concerned, there is not now and has not been for many years any discrimination practiced in Galveston County, against Negroes." In Galveston County, the names of men, Poll Tax payers, are placed in a box and when a certain number of Jurors are needed the District Clerk, the County Clerk, the Tax Assessor, the Sheriff and the District Judge, (they are the only people who are present at such time), are supposed to draw the names out of the wheel without any discrimination, but whether this is actually done or not no one knows except the Parties named, no proof was offered on this. If it appears to this Court that Counsel for the Defendant admitted that there was no discrimination shown it was meant that no discrimination was shown in drawing the names from the jury wheel. If it appears to this Court from the Stipulation of Facts, from the Opinion of the Court of Criminal Appeals and from the Brief of the State of Texas, that Counsel for Defendant admitted that no discrimination was shown in the selection of Trial Jurors, such is a gross misquotation of the agreement and a misunderstanding of the meaning of the Stipulation.

In Capital cases the State and the Defendant each have fifteen peremptory challenges, but for twenty-five years to the knowledge of the writer the State's Attorney has saved his peremptory challenges to use on Negroes, and that was done in this case.

Prejudice and discrimination is always shown in the selection of Trial Jurors when they are being examined in open Court to serve upon a particular case.

After the Motion to quash was overruled and the Indictment was read to the Jury, the Defendant pleaded not guilty and also pleaded insanity. The Defendant did not testify in the case. He was found guilty of murder and the death penalty was assessed.

An Appeal was duly taken to the Court of Criminal Appeals of the State of Texas, and on April 19th, 1950, the Court of Criminal Appeals reversed the judgment of the Trial Court and ordered the prosecution dismissed, but on the State's Motion for rehearing the Court of Criminal Appeals reversed itself and affirmed the Judgment of the Trial Court.

Judge Graves of the Court of Criminal Appeals of Texas, wrote a Dissenting Opinion in the language of Mr. Justice Jackson in *Cassell* v. *The State of Texas,* in 70 S. Ct. 629, it appears that the Court of Criminal Appeals of Texas, decided to follow the Dissenting Opinion of Mr. Justice Jackson, instead of the majority opinion.

The Defendant filed an Application for a Stay of Execution in the Supreme Court of the United States and thereafter he filed a Petition for a Writ of Certiorari in the Supreme Court of the United States, and this case is now before this Court.

POINT ONE

The Court of Criminal Appeals for The State of Texas erred in affirming the Judgment and sentence of the Trial Court in that the Motion of Petitioner to quash the Indictment should have been sustained where the record reflected that for thirty years next preceding the Indictment in the Ross case, no Negro was appointed Grand Jury Commissioner in Galveston County, Texas, and that for a period of thirty years next preceding the Indictment in the Ross case, only two Negroes served as Grand Jurors; Petitioner being a Negro and therefor denied equal protection under the Constitution of the United States and particularly the fourteenth Amendment thereto.

Argument and Authorities

In *Smith* v. *The State of Texas,* 61 S. Ct. 164, Edgar Smith was convicted of rape, the conviction was affirmed by the Court of Criminal Appeals of the State of Texas, 136 S.W. (2d) 842, and the Defendant filed a Petition for Writ of Certiorari in the Supreme Court of the United States, this case was reversed. It was held by this Court: "Where Negroes are intentionally and systematically excluded from Grand Jury service solely on account of race and color a conviction of a Negro based upon an Indictment returned by a Grand Jury so selected, is a denial of equal protection of law." "The fact that the written words of a State's Laws hold out a promise that no racial discrimination will not be practiced is not enough, since the Fourteenth Amendment requires that equal protection to all must be given, not merely promised." If this Court will read Article 333-357, of the Code of Criminal Procedure of Texas, which relates to the selection of Grand Juries there is nothing apparent from the reading of the Statute

itself to show discrimination, but in all of the cases from *Neal* v. *The State of Delaware*, 103 U.S. 370, to *Cassell* v. *The State of Texas*, 70 S. Ct. 629; 339 U.S. 282, it has been held by this Court that where no Negro has served on the Grand Jury for a long period of time and especially where there were a number of qualified Negroes in the County, the mere fact of their exclusion establishes discrimination as a matter of law.

The District Court of Galveston County, appoints Grand Jury Commissioners, for the past thirty years, such Commissioners have all been White. In the S.Ct. decisions between *Neal* v. *State of Delaware* (supra) and *Cassell* v. *The State of Texas* (supra) the questioning of Grand Jury Commissioners disclosed that they never selected Negroes to serve on a Grand Jury because they were not personally acquainted with any Negroes with the qualifications of Grand Jurors; that may be true, but this Court has held in *Hill* v. *The State of Texas*, 62 S.Ct. 1159: "Where there are qualified Negroes available for Jury service, exclusion by Jury Commissioner of all Negroes whom they do not know to be qualified, without either knowing or seeking to learn whether there are in fact any Negroes qualified to serve, constitutes discrimination, in violation of the equal protection of law's provision of the United States Constitution." If the District Judge in Galveston County, will appoint a Negro as Grand Jury Commissioner, the Commissioners appointed will know a lot of Negroes with the qualification not only to serve as Grand Jurors and as Trial Jurors, but even qualified to serve on the Supreme Court. In *Carter* v. *Texas*, 177 U.S. 442, it was held: "whenever by any action of the State, whether through its Legislature, through its Courts, or through its Executive or Administrative offices all persons of the African Race are excluded solely because of Race or color from serving as Grand

Jurors in the criminal prosecution of a person of the African Race, the equal protection of the laws is denied to him contrary to the Fourteenth Amendment to the Constitution of the United States. *(Carter* v. *Texas* is a case that was carried to this Court from Galveston County.) In *Norris* v. *The State of Alabama*, 55 S.Ct. 579 (Scottsboro case): "This Court held action of The State through Legislature, Courts or Executive or Administrative offices in excluding all Negroes solely because of race or color, from serving as Grand or Petit Jurors in criminal prosecutions against Negroes, denies equal protection contrary to the Fourteenth Amendment to the Constitution of the United States.

Paragraph four of the Stipulations is as follows: "No Negro has ever served or been selected to serve as a Grand Jury Commissioner in Galveston County, for the past thirty years." On the above facts we take the position that Grand Jury Commissioners are Judicial, Executive and Administrative Officers of the State of Texas, and that Negroes are entitled to serve as such Commissioner and at least one should have served in thirty years; that such stipulation of fact alone constitutes discrimination as a matter of law and is repugnant to the Fourteenth Amendment to the Constitution of the United States and the laws made in persuance thereof. In *Norris* v. *State of Alabama* (supra): Evidence adduced by Negro Defendant in criminal cases that for a generation or longer, no Negro had been called for service in the State Court on any Grand or Petit Jury within the County, made a prima facie case of denial of equal protection guaranteed by the Fourteenth Amendment to the Constitution of the United States.

We also take the position that Negroes possessing the qualifications are entitled to serve as Grand Jury Commissioners, as Grand Jurors and as Petit Jurors, but that from

the Stipulations it is patently apparent that for a long period of time, Negroes have been systematically excluded from serving in the above capacities, by the State of Texas over a long period of time.

Point Two

The Judgment and sentence of the Trial Court and the affirmance thereof by the Court of Criminal Appeals for the State of Texas, was and is contrary to law and violative of the constitutional rights of Petitioner and where no Negro has served as Grand Jury Commissioner in Galveston County, for the past thirty years, discrimination is shown as a matter of law; the Petitioner himself being a Negro.

Argument and Authorities

Article 333, C.C.P. of Texas, 1948, provides for the appointment of Jury Commissioners and also defines their qualifications; they are: 1. Be intelligent citizens of the County and able to read and write. 2. Be qualified Jurors and freeholders in the County. 3. Be residents of different portions of the County. 4. Have no suit in said Court which requires the intervention of a Jury. 5. The same person shall not act as Jury Commissioner more than once in the same year. From the qualifications of Grand Jury Commissioners as set out in the Statute above quoted, it is obvious to anyone who knows anything about the American Negro, that the average Negro who pays his Poll Tax in Texas, is qualified to serve in the capacity as Grand Jury Commissioner.

Yet for a period of thirty years in Galveston County, Texas, where more than twenty-one percent of the total population is of the Negro Race, no Negro has been appointed Grand Jury Commissioner by the Judge of the District Court.

The Grand Jury Commissioners are Judicial, Executive or Administrative officers of the State, and if for a period of thirty years all of such Commissioners were White, then if the American Negro has not been systematically excluded from such service in violation of the due Process Clause and Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States, as well as in violation of a rule of the Supreme Court of the United States beginning with the old cases of *Neal* v. *The State of Delaware,* 103 U.S. 370; *Strauder* v. *The State of West Virginia,* 100 U.S. 303; 25 S.E. d. 664, and a long line of cases, then there is no such thing as systematic exclusion as a matter of law.

Article 338, C.C.P. of Texas, 1948, provides that the Jury Commissioner shall select sixteen men from the citizens of the different portions of the County, to be summoned as Grand Jurors for the next term of the Court.

The qualifications of Grand Jurors are: 1. He must be a citizen of the State, and of the County in which he is to serve, and qualified under the Statutes and Laws to vote in said County; but whenever it shall be made to appear to The Court that the requisite approved Jurors should have paid their Poll Taxes cannot be found within the County, The Court shall not regard the payment of Poll Taxes as a qualification for service as a Juror. 2. He must be a freeholder within the State, or a householder within the County. 3. He must be of sound mind and good moral character. 4. He must be able to read and write. 5. He must not have been convicted of any felony. 6. He must not be under Indictment or other legal accusation for theft or of any felony.

It is the exception rather than the rule to find an adult male Negro in Galveston County, Texas, who cannot meet the qualifications of a Grand Juror.

I come now to the case of *Ross* v. *The State of Texas*, 233 S.W. 126, (this is the case now before this Court), Judge Beauchamp, of the Court of Criminal Appeals of Texas, in writing the Opinion on the 19th of April, 1950, after citing *Pierre* v. *The State of Louisiana*, 59 S.Ct. 536; *Smith* v. *Texas*, 61 S. Ct. 164, *Hill* v. *Texas*, 62 S. Ct. 1159, said: "The facts in the two Texas cases are so similar to those shown in the agreed statement in the present record, that no reasonable ground can be discovered why the holding of the Supreme Court of the United States in the Smith and Hill cases would not be followed by that Court." "We must recognize the holdings of the Supreme Court of the United States in cases so very similar that they cannot be distinguished from that now before us. Galveston County with several thousand Negro voters has had two Negroes on Grand Juries during the past thirty years. This showing will not satisfy the Court that has definitely and positively expressed its views on the question of discrimination in the Authorities cited."

We take the position that Judge Beauchamp, of our Court of Criminal Appeals, wrote correctly and followed the Rule of Law as laid down by the Supreme Court of the United States.

On the State's Motion for rehearing in the *Ross* case, Judge Graves, of our Court of Criminal Appeals, said: "A sound mind and good moral character being a fair requisite for a Grand Juror in Texas; acquaintanceship at least with the individual should be required, especially on the ground of good moral character, such being not a matter of reputation, but of knowledge. It becomes difficult to see how a Commissioner could adhere to such an admonition unless he knew the desired person and was familiar, not only with his reputation, but also with his moral character, and his record as a citizen." I agree with Judge Graves that it is

difficult for a White Grand Jury Commissioner in Texas, to know Negroes who have the qualifications of Grand Jurors, because the contact between the races is of such nature as to prevent first hand knowledge, but if the District Court will appoint a Negro Grand Jury Commissioner, it will be very easy for him to point out and select Negroes with qualifications for Grand Jurors, because he associates with them, comes in contact with them constantly, and knows them personally. If we have Negro Grand Jury Commissioners they will know Negroes who are qualified under the Statute to serve as Grand Jurors, but for a period of thirty years in Galveston County, the District Court had not appointed one Negro as Grand Jury Commissioner; perhaps he did not know any who had the qualifications, but this Court has repeatedly held that it is the duty of the Grand Jury Commissioner to find out whether or not there are any Negroes in the County, qualified for Grand Jury Service; it was so held in *Hill* v. *The State of Texas*, 62 S. Ct. 1159. Chance or accident could hardly have accounted for the continuous omission of Negroes from the Grand Jury Commission in Galveston County, for a period of thirty years.

Where the names of all male Poll Tax Payers are placed in the Jury Wheel as directed by the Statute, and if they are drawn out as so directed, it is absolutely and positively impossible to draw only two names with Negroes out of the wheel in a period of thirty years, in Galveston County.

In Paragraph 11, of the Stipulations, it is said: "In short it is agreed that insofar as the selection, drawing and summoning of Petit or Trial Jurors are concerned, there is not now and has not been for many years any discrimination against Negroes in Galveston County." It appears from the Stipulation just quoted that there is no discrimination against Negroes in Galveston County, with respect to

Trial Juries, but such is preposterous; the common sense of the slightest informed person would revolt at such. My understanding of that Stipulation was that there was no discrimination in the manner in which the Negroes' names were drawn out of the Jury Wheel, but the Court House is rife with racial prejudice and discrimination when prospective Jurors of color are examined for the trial of a case.

In Smith v. *Texas,* 61 S.Ct. 164, it is held: "The Texas Statute providing for selection of Grand Juries is not in itself unfair and is capable of being carried out without racial discrimination." It is customary in Galveston County, when citizens are being examined for service as a Trial Juror for the State's Attorney to use and exercise his peremptory challenges on Negroes. Attention is called to what Mr. Justice Black said speaking for the Supreme Court of the United States: "Here the Texas Statutory scheme is not in itself unfair; it is capable of being carried out with no racial discrimination whatsoever. (Articles 333-350, C.C.P. of Texas.) But by reason of the wide discretion permissible in the various steps of the plan it is equally capable of being applied in such a manner as practically to proscribe any group thought by the law's administrators to be undesirable, and from the record before us the conclusion is inescapable that it is the latter application that is prevalent in Harris (Galveston) County, Texas. With respect to serving as Grand Jury Commissioners, as Grand Jurors and as Petit Jurors in Galveston County, Texas, Negroes are like it was said about Cisalpine Gaul: "Hemmed in on all sides by the nature of the place."

The Fourteenth Amendment forbids any discrimination against a race in the selection of a Grand Jury. The burden is, of course, upon the Defendant to establish the discrimination. Defendants under our Criminal Statutes are not entitled to demand representatives of their racial inheritance

upon Juries before whom they are tried. But such Defendants are entitled to require that those who are trusted with Jury selection shall not pursue a course of conduct which results in discrimination in the selection of Jurors on racial grounds, *Akins* v. *The State of Texas*, 65 S. Ct. 1276; *Hill* v. *Texas*, 62 S. Ct. 1161.

4. The Stipulations provide no Negro has ever served or been selected to serve as a Grand Jury Commissioner in Galveston County, for the past thirty years.

5. For a period of thirty years next preceding the return of the Indictment in this cause, only two Negroes have served as Grand Jurors in Galveston County.

6. The Grand Jury that indicted Defendant in this cause, consisted of twelve White men.

The Defendant contends that the agreed facts stated in paragraphs 4, 5, and 6 of the Stipulations established systematic and arbitrary racial discrimination as a matter of law, and we believe that we have met the burden placed upon the Defendant.

Under Point One, of the State's Brief, it is vigorously argued that a Grand Jury in Texas is useless and unnecessary, but we still have Grand Juries in Texas, and with respect to such it has been held by the Supreme Court in *Pierre* v. *The State of Louisiana*, 59 S. Ct. 536: "Systematic exclusion of Negroes because of race from Grand Jury and Venire from which the Grand Jury is selected, constitutes a denial of equal protection of the laws contrary to the Federal Constitution." "In selection of Jury to pass on his life, liberty, or property, a Negro has a right that there shall be no exclusion of his race, and no discrimination against them because of their color."

When the Commissioners were appointed as judicial Administrative Officials in Galveston County, it was their

duty to familiarize themselves fairly with the qualifications of the eligible jurors of the County, without regard to race or color. Discrimination can arise from the action of commissioners who exclude all Negroes whom they do not know to be qualified, and who neither know nor seek to learn whether there are in fact any qualified Negroes to serve. In such a case discrimination necessarily results where there are qualified Negroes available for jury service.

If one factor is uniform in a continuing series of events that are brought to pass through human intervention, the law would have to have the blindness of indifference rather than the blindness of impartiality, not to attribute the uniform factor to man's purpose. The purpose may not be of evil intent or in conscious disregard of what is conceived to be a binding duty. Prohibited conduct may result from misconception of what duty requires.

In Galveston County, where more than twenty one per cent of the population is of the Negro race, could it happen by chance or accident, that for a period of thirty years no Negro was appointed Grand Jury Commissioner? Could it happen by chance or accident that only twice in a period of thirty years next preceding the *Ross* case, that only two Negroes could be selected to serve as Grand Jurors in Galveston County? We believe that the unexplained absence of Negroes from the Grand Jury over such a long period of time constitutes discrimination as a matter of law; *Cassell* v. *The State of Texas*, 70 S. Ct. 629.

Conclusion

It is respectfully submitted that the petition for a writ of certiorari should be granted and that the judgment of the Court of Criminal Appeals of the State of Texas affirming

the judgment of the District Court of Galveston County, should be reversed and the prosecution ordered dismissed.

Respectfully submitted,

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